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UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT
 OF CALIFORNIA – SOUTHERN DIVISION

MOPHIE, INC., formerly known as
 mSTATION Corporation, a California
 Corporation, and DANIEL HUANG, an
 individual,

Plaintiffs,

vs.

LOZA & LOZA, LLP, a California Limited
 Liability Partnership, JULIO LOZA, an
 individual, and CHRISTINE S. LOZA, an
 individual,

Defendants.

CASE NO. 8:11-cv-00539-DOC-MLG

[Honorable David O. Carter]

DEFENDANTS' NOTICE OF MOTION
 AND MOTION TO STRIKE PORTIONS
 OF PLAINTIFFS' COMPLAINT
 PURSUANT TO F.R.C.P. 12(f);
 MEMORANDUM OF POINTS AND
 AUTHORITIES

DATE: June 6, 2011
 TIME: 8:30 a.m.
 COURTROOM: 9D

TO PLAINTIFFS AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on June 6, 2011 at 8:30 a.m., or as soon thereafter
 as the matter may be heard in Courtroom 9D of the above-entitled court, located at 411 West
 Fourth Street, Santa Ana, California, Defendants Loza & Loza, LLP, Julio Loza, and Christina S.
 Loza, erroneously named herein as Christine S. Loza, will move this court pursuant to Federal
 Rule of Civil Procedure 12(f) to strike the following portions of the Complaint of Plaintiffs
 Mophie, Inc., and Daniel Huang:

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1. Paragraph 78 on page 24 in its entirety, which reads as follows:

“78. The conduct of Defendants, and each of them, as alleged above, was grossly negligent, unconscionable, fraudulent, oppressive, malicious and done intentionally or in conscious disregard of Plaintiffs’ rights and Defendants’ fiduciary obligations, and in order to protect themselves and further their own interests at Plaintiffs’ expenses and to their detriment, so as to justify an award of punitive damages.”

2. Paragraph 90 on page 28 in its entirety, which reads as follows:

“90. The conduct of Defendants, and each of them, as alleged above, was grossly negligent, unconscionable, fraudulent, oppressive, malicious and done intentionally or in conscious disregard of Plaintiffs’ rights and Defendants’ fiduciary obligations, and in order to protect themselves and further their own interests at Plaintiffs’ expenses and to their detriment, so as to justify an award of punitive damages.”

3. Paragraph 101 on page 31 in its entirety, which reads as follows:

“101. The conduct of Defendants, and each of them, as alleged above, was grossly negligent, unconscionable, fraudulent, oppressive, malicious and done intentionally or in conscious disregard of Plaintiffs’ rights and Defendants’ fiduciary obligations, and in order to protect themselves and further their own interests at Plaintiffs’ expenses and to their detriment, so as to justify an award of punitive damages.”

4. The prayer for punitive damages on page 31, line 19, which reads in pertinent part as follows:

“2. For punitive damages;”

This motion was made following the conference of counsel pursuant to Local Rule 7-3 which took place on April 25, 2011.

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1 This Motion is based on this Notice of Motion and Motion, the attached
2 Memorandum of Points of Authorities in Support thereof, matters which may be judicially
3 noticed, the pleadings and records on file in this action, and on such oral argument as the court
4 may permit at the hearing of this matter.

5
6 DATED: April 29, 2011

LINDAHL BECK LLP

7
8 By 

George M. Lindahl

9 Attorneys for Defendants
10 Loza & Loza, LLP, Julio Loza
11 and Christina S. Loza
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MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION

Plaintiffs, Mophie, Inc., and Daniel Huang (“Plaintiffs”), have asserted claims for legal malpractice and breach of fiduciary duty against Loza & Loza, LLP, Julio Loza and Christina S. Loza (“Defendants”) based on legal services Defendants rendered with respect to Mophie, Inc.’s intellectual property portfolio. Specifically, Plaintiffs allege that Defendants failed to properly advise and represent them concerning various patent and trademark applications and efforts to enforce certain patents, and failed to properly maintain their files. While Defendants deny all of Plaintiffs’ charging allegations, Defendants concede that Plaintiffs have properly stated their claims for relief. However, Plaintiffs have not alleged the malice, oppression or fraud necessary to support their claims for punitive damages. Consequently, Plaintiffs’ claims and prayer for punitive damages are improper and should be stricken from the Complaint.

2. FACTUAL BACKGROUND

Plaintiffs allege that Loza & Loza, LLP, represented Mophie, Inc. (“Mophie”) and Daniel Huang (“Huang”) in connection with Mophie’s intellectual property portfolio. (Compl. ¶¶ 14, 16.) Plaintiffs allege that Mophie retained Defendants to “advise Mophie regarding intellectual property issues, including development of its intellectual property portfolio, protection of its ideas, designs, inventions and trademarks, and to provide advice regarding intellectual property issues.” (Compl. ¶ 14.) Plaintiffs further allege that “Defendants also undertook representation of Plaintiff Huang’s interests in connection with Plaintiff Mophie’s intellectual property portfolio.” (Compl. ¶ 16.)

According to the Complaint, Defendants’ conduct in representing Mophie was “unprofessional, unethical, and negligent,” thereby causing Plaintiffs to suffer economic injury and other damages. (Compl. ¶¶ 1, 2.) Among other claims, Plaintiffs allege that Defendants drafted overly aggressive cease and desist letters; failed to properly transfer patents from Huang to Mophie; failed to include the names of co-inventors on Huang’s patent applications; made unpersuasive arguments to the Patent and Trademark Office; included an incorrect company

name on trademark applications, and failed to provide plaintiffs with a properly organized client file. (Compl. ¶¶ 29, 41, 47, 59, 63, 67.)

Although Plaintiffs have asserted strictly professional negligence-based claims for relief, they also inappropriately seek punitive damages based solely on the factually unsupported conclusion that:

The conduct of Defendants, and each of them, as alleged above, was grossly negligent, unconscionable, fraudulent, oppressive, malicious and done intentionally or in conscious disregard of Plaintiffs' rights and Defendants' fiduciary obligations, and in order to protect themselves and further their own interests at Plaintiffs' expenses (sic) and to their detriment, so as to justify an award of punitive damages.

(Compl. ¶¶ 78, 90, 101.) As discussed below, Plaintiffs' punitive damage claims should be stricken.

3. THE COURT SHOULD STRIKE PLAINTIFFS' PRAYER FOR PUNITIVE DAMAGES BECAUSE PLAINTIFFS FAIL TO SUFFICIENTLY ALLEGE MALICE, OPPRESSION, OR FRAUD

a. The Court May Strike a Prayer for Punitive Damages When It Is Not Supported by Sufficient Factual Allegations

The court may strike pleadings or portions of pleadings not drawn in conformity with the Federal Rules. Fed. R. Civ. P. 12 ["The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."] If a plaintiff fails to plead a proper basis for punitive damages, the court may strike punitive damages from the prayer for relief. See *Miles v. Apex Marine Corp.*, 498 U.S. 19, 22 (1990) [upholding 5th Circuit decision striking punitive damages from negligence claim]; *Coffman v. Federal Laboratories*, 323 U.S. 325, 327 (1945) [upholding District Court decision striking equitable relief from complaint.]

A plaintiff must plead "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8. Under Rule 8(a)(2), "the plain statement [must]

possess enough heft to show that the pleader is entitled to relief.” *Bell Atlantic Corp v. Twombly*, 550 U.S. 544, 557 (2007). This threshold requirement prohibits plaintiffs from making “a largely groundless claim . . . with the right to do so representing an *in terrorem* increment of the settlement value.” *Twombly, supra*, 550 U.S. at 557-558.

“The pleading standard Rule 8 announces does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) [internal quotation marks omitted]. A pleading is deficient if it merely offers “labels and conclusions, or tenders naked assertions devoid of further factual enhancement.” *Id.* [internal quotation marks omitted]. “While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.” *Id.* at 1350.

In *Ashcroft*, the plaintiff sued government officers alleging that they “knew of, condoned, and willfully and maliciously agreed to subject him to harsh conditions of confinement as a matter of policy solely on account of his religion, race, and/or national origin and for no legitimate penological interest.” *Id.* at 1951 [internal quotation marks and brackets omitted]. The court ruled that this language was “a formulaic recitation,” “conclusory,” and “too chimerical to be maintained.” *Id.* at 1951.

b. Plaintiffs Have Not Properly Pled A Claim For Punitive Damages

Plaintiffs’ allegations fall woefully short of the stringent pleading standards required for punitive damages. The Complaint does not contain any allegations of conduct by any of the defendant attorneys that was malicious, oppressive and/or fraudulent as required by Civil Code § 3294. Because plaintiffs have failed to properly plead a claim for punitive damages, the court should strike the claims and prayer for punitive damages from the Complaint.

Punitive damages, historically and by statutory definition, are not compensation for loss. Rather, their sole purpose is to punish and deter the wrongful actor. *Piscitelli v. Friedenbergs*, 87 Cal.App.4th 953, 980 (2001). Thus, the “imposition of punitive damages is an expression of . . . moral condemnation.” *Ferguson v. Lieff, Cabraser, Heimann & Bernstein*, 30 Cal.4th 1037, 1048 (2003). Because punitive damage awards constitute a windfall and create

1 “the anomaly of excessive compensation,” they are not favored in the law. *Piscitelli*, supra, 87
 2 Cal.App.4th at 980 (citing *Dumas v. Stocker*, 213 Cal.App.3d 1262, 1266 (1989)). Punitive
 3 damages are a disfavored remedy and should only be allowed in the “clearest of cases.” *Beck v.*
 4 *State Mutual Auto. Ins. Co.*, 54 Cal.App.3d 347, 355 (1976).

5 Civil Code §3294 allows recovery for punitive damages where it is proven by
 6 clear and convincing evidence that the defendant is guilty of fraud, malice or oppression. Section
 7 3294(c) defines these three terms very narrowly:

- 8 1. “Malice” means conduct which is intended by the defendant to
 9 cause injury to the plaintiff or despicable conduct which is carried
 10 on by the defendant with a willful and conscious disregard of the
 11 rights or safety of others;
- 12 2. “Oppression” means despicable conduct that subjects a person to
 13 cruel and unjust hardship in conscious disregard of that person’s
 14 rights;
- 15 3. “Fraud” means an intentional misrepresentation, deceit, or
 16 concealment of a material fact known to the defendant with the
 17 intention on the part of the defendant of thereby depriving a
 18 person of property or legal rights or otherwise causing injury.

19 By definition, “oppression” is “despicable conduct” and encompasses “conduct
 20 which is so vile, base, contemptible, miserable, wretched or loathsome that it would be looked
 21 down upon and despised by ordinary decent people.” *Mock v. Michigan Millers Mutual Ins. Co.*,
 22 4 Cal.App.4th 306, 331 (1992) (quoting BAJI 14.72.1 [1989 rev.]). It has also been vividly
 23 described as “having the character of outrage frequently associated with crime.” *Tomaselli v.*
 24 *Transamerica Ins. Co.*, 25 Cal.App.4th 1269, 1287 (1994) (emphasis added). Similarly, as noted
 25 above, “malice” is either conduct intended to cause injury or “despicable conduct” done with a
 26 “conscious disregard” for the rights of others.

27 A plaintiff must plead the ultimate facts of a defendant’s malice, fraud or
 28 oppression to support a claim for punitive damages. *Cyrus v. Haveson*, 65 Cal.App.3d 306, 316-

17 (1976). A “conclusory characterization of defendant’s conduct as intentional, willful and fraudulent is a patently insufficient statement of ‘oppression, fraud or malice, expressed or implied,’ within the meaning of [Civil Code] §3294.” *Brousseau v. Jarrett*, 73 Cal.App.3d 864, 872 (1977) (emphasis added). Moreover, “the use of words wrongfully, willfully and maliciously add nothing to a pleading except to convey a sense of outrage on the part of the plaintiff.” *Marin v. Jacuzzi*, 224 Cal.App.2d 549, 552 (1964); see also *Blegen v. Superior Court*, 125 Cal.App.3d 959, 963 (1981) (“willful,” “fraudulent,” “malicious” and “oppressive” are conclusory terms that must be supported with sufficient facts).

The allegations of the breach of fiduciary duty and legal malpractice causes of action against Defendants do not support Plaintiffs’ request for punitive damages. As Plaintiffs have not asserted a fraud claim, they must allege facts rising to the level of malice or oppression necessary for an award of punitive damages. However, they have failed to do so. Instead, plaintiffs have asserted “garden variety” professional negligence against Defendants, namely, “botched attempts to enforce Plaintiffs’ patents”; filing patent applications in the name of Huang as the inventor and owner, rather than in Mophie’s name; “mishandled” design patent and trademark applications; and failing to maintain their files in a professional manner. [Complaint, p. 6, l. 5-6; p. 11, l. 3-5; p. 14, l. 12-13; p. 16, l. 18-19 and ¶¶ 65 and 68.]

It is well-established that allegations of simple negligence in a legal malpractice action fall far short of the “oppression, fraud or malice” required by California Civil Code §3294 and cannot support an award of punitive damages. *Jackson v. Johnson*, 5 Cal.App.4th 1350, 1354 (1992). Even if plaintiffs’ allegations are true, Defendants’ alleged misconduct does not rise to the level of “evil” or “criminal” conduct necessary to support an award of punitive damages. *Tomaselli v. Transamerica Ins. Co.*, *supra*, 25 Cal.App.4th at 1288.

In short, plaintiffs’ allegations (which defendants categorically deny) might support a negligence claim, but do not describe the despicable conduct required to establish malice or oppression - “conduct which is so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people.” *Mock v. Michigan Millers Mutual Ins. Co.*, 4 Cal.App.4th 306, 331 (1992) (quoting BAJI 14.72.1 [1989

rev.]). Similarly, there is no allegation that any of the Defendants had any intention to injure plaintiffs or a conscious disregard for their rights as required for a showing of malice.

Furthermore, a cause of action for breach of fiduciary duty in and of itself does not support a claim for punitive damages without allegations of malice or oppression because breach of fiduciary duty is considered constructive, not actual, fraud:

Because a breach of fiduciary obligation does not require wrongful intent, constructive fraud is not an intentional tort. Although the attorney may have acted with wrongful intent, the misconduct often is attributable to negligence. In other words, a breach of the standard of care is negligence, and a breach of fiduciary obligation is constructive fraud.

Legal Malpractice (5th Ed.), Mallen & Smith, §8.11; *Tomaselli*, 25 Cal.App.4th at 1287 (a breach of fiduciary alone without malice, fraud or oppression does not permit an award of punitive damages).

In sum, Plaintiffs' conclusory allegations that they are entitled to punitive damages do not contain sufficient facts demonstrating the type of "vile, base, contemptible, miserable, wretched or loathsome" conduct necessary to justify the imposition of punitive damages. The Complaint fails to properly allege the type of fraud, malice or oppression necessary to support an award of exemplary damages. Instead, Defendants' alleged conduct can at worst be categorized as negligent, and even grossly negligent conduct cannot support an award of punitive damages. *G.D. Searle & Co. v. Superior Court*, 49 Cal.App.3d 22, 31 (1975). Accordingly, all claims and prayers for punitive damages should be stricken from the Complaint.

c. Plaintiffs' Punitive Damage Allegations Should Also Be Stricken Because They Fail To Meet The Rule 8 Pleading Standards Established By The Supreme Court

Plaintiffs' boilerplate allegations do not support a claim for fraud, malice, or oppression and, in turn, are an inadequate basis for punitive damages. A plaintiff suing for professional negligence or breach of fiduciary duty must establish malice, oppression or fraud in order to sustain a prayer for punitive damages. *Smith v. Superior Court*, 10 Cal.App.4th 1033,

1 1042 (1992). As discussed above, however, Plaintiffs allege only garden-variety professional
 2 negligence. Noticeably absent are allegations of evil motive, despicable conduct or behavior so
 3 outrageous that it would resemble a crime. Nowhere does plaintiff make any factual allegations
 4 supporting the claim that defendants are guilty of vile, loathsome or contemptible conduct.

5 Nonetheless, plaintiffs' prayer for relief raises the *in terrorem* settlement specter
 6 of punitive damages. In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007), the Supreme
 7 Court ruled that such factually unfounded claims fall short of Rule 8 pleading standards. Rather
 8 than properly support their request for punitive damages with "enough heft to show that the
 9 pleader is entitled to relief" as required by *Twombly*, Plaintiffs simply added the following pro
 10 forma paragraph at the end of each cause of action:

11 The conduct of Defendants, and each of them, as alleged above,
 12 was grossly negligent, unconscionable, fraudulent, oppressive,
 13 malicious and done intentionally or in conscious disregard of
 14 Plaintiffs' rights and Defendants' fiduciary obligations, and in
 15 order to protect themselves and further their own interests at
 16 Plaintiffs' expenses and to their detriment, so as to justify an award
 17 of punitive damages.

18 (Compl. ¶¶ 78, 90, 91.) This paragraph epitomizes the "the-defendant-unlawfully-harmed-me
 19 accusation" condemned in *Ashcroft* because it fails to allege any facts that would support its legal
 20 conclusion that Defendants' behavior was "unconscionable," "oppressive," or "malicious."

21 Under *Ashcroft*, these types of legal conclusions can provide the framework for
 22 punitive damages; however, they must be supported by factual allegations. *Ashcroft*, *supra*, 129
 23 S.Ct. at 1350. In *Ashcroft*, the Supreme Court held that the plaintiff's complaint fell short of
 24 Rule 8 requirements when he alleged that the defendants "knew of, condoned, and willfully and
 25 maliciously agreed to subject him to harsh conditions of confinement." *Id.* at 1351. Like the
 26 plaintiff in *Ashcroft*, Plaintiffs in the present case make the conclusory, formulaic assertion that
 27 "the conduct of defendants, and each of them, was grossly negligent, unconscionable, fraudulent,
 28 oppressive, malicious and done intentionally or in conscious disregard of Plaintiffs' rights . . ."

(Compl. ¶¶ 78, 90, 101.) For the same reasons nearly identical allegations in *Ashcroft* fell short of Rule 8 pleading requirements, Plaintiffs' punitive damage allegations here also fall short.

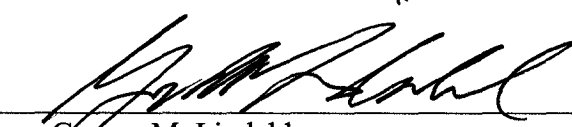
4. CONCLUSION

For the foregoing reasons, defendants Loza & Loza, LLP, Julio Loza and Christina S. Loza respectfully request that the court grant this motion and strike Paragraphs 78, 90 and 101 and the prayer for punitive damages at page 31, line 19, from the Complaint without leave to amend.

DATED: April 29, 2011

LINDAHL BECK LLP

By


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